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Gopela Krishnan a/l Arumugam v Public Prosecutor

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HIGH COURT (IPOH) — CRIMINAL REVISION NO AA-43–13–09 OF 2022
MOSES SUSAYAN JC
1 FEBRUARY 2024

C

Criminal Procedure — Revision — Coroner's inquiry — Inquest into cause of death — Accuracy, legality and appropriateness of coroner's finding — Deceased killed in incident involving police — coroner issued 'open verdict' after inquiring into case — Whether coroner's decision to issue 'open verdict' was justified

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The applicant was the father of the deceased, who was killed in an incident involving the police in an alleged criminal pursuit. On the night of 7 October 2016 until the early morning of 8 October 2016, a police operation known as *Ops Cantas* was conducted in the areas of Sitiawan and Air Tawar. The operation was led by SI3 along with SI4 and two other officers. Around 3.15am, the police team encountered a suspicious Proton Waja that was driving slowly, observing the surroundings of closed shops, which raised suspicions. The police vehicle approached the Proton Waja and signalled it to stop but the Proton Waja accelerated and fled. A chase ensued and eventually, the car veered off the road. One male occupant exited the Proton Waja from the driver's seat. SI3 and SI4, who were about 20 metres away in the police vehicle, got out shouting 'Polis!'. A gunshot was heard, and the male who exited the Proton Waja, was allegedly seen holding a gun. In self-defence, SI3 and SI4, each fired a shot toward the male. The male fell with gunshot wounds to his chest. SI3 identified him as one Mohan a/l Gopela Krishnan, an Indian of Malaysian nationality with a wanted status and record of past offences. The finding from subsequent investigations was that no gunshot residue was found on the deceased's hands and tests showed that the deceased had dangerous drugs in his blood and urine. The death of the deceased was called for a full enquiry to determine the circumstance surrounding his death. An open verdict was declared by a coroner in the Coroner's Court. Dissatisfied with the open verdict, the applicant sought a revision in the High Court, citing s 35(1) of the Courts of Judicature Act 1964 and s 325(1) of the Criminal Procedure Code ('the CPC'). The High Court overturned the open verdict of the coroner. The Attorney General's Chambers appealed against the decision of the High Court. The Court of Appeal allowed the appeal and remanded the case back to the High Court, to be heard by a different judge. Hence, the case before this court on revision of the decision by the coroner who gave an 'open verdict' after considering the circumstances surrounding the deceased's death.

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Held:

(1) The coroner had clearly identified who the deceased was, the time and place of his death, the cause of death, and any involvement of others. With these primary questions in s 337 of the CPC being answered, the coroner should have reached a conclusive verdict. There was no evidence suggesting that the deceased knowingly fled from the police, as the police car used in the chase was without police insignia. The coroner seemed to accept that the deceased's car veered off the road during the chase, but the photo of the stalled car showed it was parked and with the handbrake engaged. This indicated the deceased intentionally parked before exiting (see paras 35 & 39–40).

(2) The forensic findings proved the gun found next to the deceased did not have the deceased's DNA or fingerprint on it. There was no gunshot residue on the gun or on the deceased. Further, there were no bullet casing found near the deceased and there was no bullet trajectory which referred to the path that a bullet from the moment it was allegedly fired by the deceased until it reached its target. In the absence of this evidence, the only conclusion that one could come to was, the deceased did not fire a gun during the incident (see para 42).

(3) The conduct of officers ie SI3 and SI4, clearly showed their failure to adhere to the Inspector General Standing Order ('IGSO') guidelines during the discharge of their duties. These officers admitted to shooting at the chest/body of the deceased, an action that demonstrated a blatant disregard and ignorance of the IGSO, which stipulated more restrained and specific methods of engagement, such as shooting at the legs or tires. This ignorance and deviation from established protocols were deemed unreasonable. There was a lack of judicial appreciation of the evidence presented before the coroner. The coroner ought to have arrived at a definitive verdict of 'homicide' rather than an 'open verdict'. Therefore, the 'open verdict' of the coroner was set aside and substituted with 'homicide' (see paras 43–44, 49 & 51).

[Bahasa Malaysia summary

Pemohon adalah bapa kepada si mati, yang terbunuh dalam satu kejadian yang melibatkan polis dalam dakwaan mengejar jenayah. Pada malam 7 Oktober 2016 hingga awal pagi 8 Oktober 2016, satu operasi polis dikenali sebagai Ops Cantas telah dijalankan di kawasan Sitiawan dan Air Tawar. Operasi itu diketuai oleh SI3 bersama SI4 dan dua lagi pegawai. Sekitar jam 3.15 pagi, pasukan polis terserempak dengan Proton Waja yang mencurigakan yang memandu perlahan sambil memerhatikan persekitaran kedai yang ditutup, yang menimbulkan kecurigaan. Kenderaan polis itu menghampiri Proton Waja dan memberi isyarat supaya berhenti tetapi Proton Waja itu memecut laju dan melarikan diri. Kejar mengejar berlaku dan akhirnya, kereta itu

terbabas dari jalan raya. Seorang penumpang lelaki keluar dari Proton Waja dari tempat duduk pemandu. SI3 dan SI4, yang berada kira-kira 20 meter di dalam kenderaan polis, keluar sambil menjerit 'Polis!'. Satu tembakan kedengaran, dan lelaki yang keluar dari Proton Waja itu, didakwa dilihat memegang pistol. Dalam mempertahankan diri, SI3 dan SI4, masing-masing melepaskan satu tembakan ke arah lelaki itu. Lelaki itu terjatuh dengan kesan tembakan di dadanya. SI3 mengenal pasti dia sebagai seorang Mohan a/l Gopela Krishnan, seorang India warganegara Malaysia dengan status dikehendaki dan rekod kesalahan lampau. Dapatan daripada siasatan seterusnya adalah sisa tembakan ditemui pada tangan si mati dan ujian menunjukkan si mati mempunyai dadah berbahaya dalam darah dan air kencingnya. Kematian si mati dipanggil untuk siasatan penuh bagi menentukan keadaan sekitar kematiannya. Keputusan terbuka telah diisytiharkan oleh koroner di mahkamah koroner. Tidak berpuas hati dengan keputusan terbuka tersebut, pemohon memohon semakan di Mahkamah Tinggi, memetik s 35(1) Akta Mahkamah Kehakiman 1964 dan s 325(1) Kanun Tatacara Jenayah ('KTJ'). Mahkamah Tinggi membatalkan keputusan terbuka koroner. Jabatan Peguam Negara merayu terhadap keputusan Mahkamah Tinggi. Mahkamah Rayuan membenarkan rayuan dan mengembalikan semula kes itu ke Mahkamah Tinggi, untuk didengar oleh hakim yang berbeza. Oleh itu, kes di hadapan mahkamah ini mengenai semakan keputusan oleh koroner yang memberikan 'keputusan terbuka' selepas mempertimbangkan keadaan sekitar kematian si mati.

Diputuskan:

(1) Koroner telah mengenal pasti dengan jelas siapa si mati, masa dan tempat kematiannya, punca kematian, dan sebarang penglibatan orang lain. Dengan soalan utama dalam s 337 KTJ ini dijawab, koroner sepatutnya mencapai keputusan muktamad. Tiada keterangan menunjukkan bahawa si mati dengan sengaja melarikan diri daripada polis, kerana kereta polis yang digunakan dalam pengejaran itu tanpa lambang polis. Koroner seolah-olah menerima bahawa kereta si mati tergelincir dari jalan semasa mengejar, tetapi gambar kereta yang terhenti menunjukkan ia diletakkan dan dengan brek tangan digunakan. Ini menunjukkan si mati berniat meletakkan kenderaan sebelum keluar (lihat perenggan 35 & 39–40).

(2) Penemuan forensik membuktikan pistol yang ditemui di sebelah si mati tidak mempunyai DNA atau cap jari si mati. Tiada sisa tembakan pada pistol atau pada si mati. Tambahan pula, tiada kelongsong peluru ditemui berhampiran si mati dan tiada trajektori peluru yang merujuk kepada laluan peluru dari saat ia didakwa dilepaskan oleh si mati sehingga ia mencapai sasarannya. Sekiranya tiada keterangan ini, satu-satunya kesimpulan yang boleh dibuat adalah, si mati tidak melepaskan tembakan semasa kejadian (lihat perenggan 42).

(3) Kelakuan pegawai iaitu SI3 dan SI4, jelas menunjukkan kegagalan mereka mematuhi garis panduan Perintah Tetap Ketua Polis Negara ('PTKPN') semasa menjalankan tugas. Pegawai-pegawai ini mengaku menembak di dada/badan si mati, satu tindakan yang menunjukkan secara terang-terangan mengabaikan dan tidak mengetahui PTKPN, yang menetapkan kaedah penglibatan yang lebih terkawal dan khusus, seperti menembak di kaki atau tayar. Kejahilan dan penyelewengan daripada protokol yang ditetapkan ini dianggap tidak munasabah. Terdapat kekurangan penghayatan kehakiman terhadap keterangan yang dikemukakan di hadapan koroner. Koroner sepatutnya mencapai keputusan muktamad 'homisid' dan bukannya 'keputusan terbuka'. Oleh itu, 'keputusan terbuka' koroner telah diketepikan dan digantikan dengan 'homisid' (lihat perenggan 43–44, 49 & 51).]

Cases referred to

Briginshaw v Briginshaw (1938) 60 CLR 336, HC (refd)
Inquest into the Death of Anthony Chang Kim Fook [2007] MLJU 1; [2007] 2 CLJ 362, HC (refd)
Ketua Polis Daerah Shah Alam & Ors v Nor Azura bt Amzah (administrator for the estate of Aminulrashid bin Amzah, deceased) & Anor and another appeal [2018] 5 MLJ 805, CA (refd)
Noor Shariful Rizal bin Noor Zawawi v PP [2017] 3 MLJ 460, CA (refd)
PP v Shanmugam & Ors [2002] 6 MLJ 562, HC (distd)
Teoh Meng Kee v PP [2014] 5 MLJ 741; [2014] 7 CLJ 1034, CA (refd)

Legislation referred to

Births and Deaths Registration Act 1957
Courts of Judicature Act 1964 ss 31, 35, 35(1)
Criminal Procedure Code ss 323, 325(1), 328, 337, 339

Raam Kumar (with V Selva) (V Selva & Assoc) for the applicant.
Evangelin a/p Simon Silvaraj (Deputy Public Prosecutor, Perak Legal Advisor's Office) for respondent.

Moses Susayan JC:

HISTORICAL BACKGROUND

[1] The applicant Gopela Krishnan is the father of the deceased Mohan a/l Gopela Krishnan, who was killed in an incident involving the police in an alleged criminal pursuit. The death of the deceased was called for a full enquiry to determine the circumstance surrounding his death. An open verdict was declared by a coroner on 29 August 2022, in the Coroner's Court in Ipoh, Perak.

[2] Dissatisfied with the open verdict, the applicant sought a revision in the High Court, citing s 35(1) of the Courts of Judicature Act 1964 and s 325(1) of the Criminal Procedure Code. On 12 January 2023, the High Court overturned the open verdict of the coroner.

[3] The Attorney General's Chamber, appealed against the decision of the High Court. On 3 August 2023, the Court of Appeal allowed the appeal and remanded the case back to the High Court, to be heard by a different judge.

[4] Hence the case before me is on revision of the decision by the learned coroner on 29 August 2022, who gave an 'opened verdict' after considering the circumstances surrounding the deceased's death.

BACKGROUND FACTS ACCORDING TO THE POLICE

[5] On the night of 7 October 2016, until the early morning of 8 October, 2016, a police operation known as *Ops Cantas* was conducted in the areas of Sitiawan and Air Tawar. The operation was led by ASP Sukjit Singh a/l Jagara Singh ('SI3'), along with Koperal Zulhadi ('SI4') and two other officers, Sarjan Raini, and Koperal Hazrul. They were patrolling in a police team vehicle, a Proton Preve without police insignia.

[6] Around 3.15 in the early morning, the police team encountered a suspicious Proton Waja with license plate JHF 1921 in Pekan Air Tawar. The Proton Waja was driving slowly, observing the surroundings of closed shops, which raised suspicions.

[7] The police vehicle approached the Proton Waja and signalled it to stop by horning. SI3 extended his hand through the window, shouting 'polis, polis, polis' signalling it to stop. SI3 could not see inside of the Proton Waja as it was tinted. Anyway, the Proton Waja accelerated and fled towards Setiawan.

[8] A chase ensued, with the Proton Waja beating traffic lights and exceeding 100 km/h. The police team pursued the Proton Waja for about seven to ten kilometres. Attempts to stop the car using sirens and honking were unsuccessful. Eventually, the car veered off the road at a 90 degree junction turn.

[9] One male occupant exited the Proton Waja from the driver's seat. SI3 and SI4, who were about 20 metres away in the police vehicle, got out, shouting 'Polis!'. A gunshot was heard, and the male who exited the Proton Waja, was allegedly seen holding a gun. In self-defence, SI3 and SI4, each fired shot toward the male. The male fell, and SI3 approached him, observing gunshot wounds to his chest.

[10] Upon checking the deceased's identification, SI3 identified him as Mohan a/l Gopela Krishnan, an Indian of Malaysian nationality with a wanted status and a record of past offenses.

[11] The finding from subsequent investigations was that no gunshot residue was found on the deceased's hands. The Department of Chemistry Malaysia's test showed that the deceased had dangerous drugs, specifically amphetamine and methamphetamine, in his blood and urine. The blood found on the deceased's clothes matched his own.

[12] In the aftermath of this incident, the deceased's parents initiated a civil suit against two insurers, Prudential Assurance (M) Bhd and AIA Assurance (M) Bhd, to claim life insurance benefits. The insurers had disclaimed liability, on the basis that the deceased was involved in criminal activities at the time of his death. However, on 10 April 2023, the High Court ruled in favour of the deceased's parents, finding that the insurers' disclaimer of liability was not substantiated and ordering them to pay the insurance benefits.

[13] It is important to note that no court has made a factual determination that the deceased was engaged in criminal activities at the time he was shot dead by the police. The deceased's parents did not pursue legal action against the police or the Government of Malaysia but participated in the coroner's proceedings to seek the truth regarding their son's death.

INQUEST DETERMINATION

[14] The Right Honourable Chief Justice, in consultation with the Chief Judges of Malaya, Sabah, and Sarawak, has issued a Practice Direction No 2 of 2019, a guideline for handling cases involving sudden death reports and death investigations by the sessions court coroner. This guideline is titled 'Garis Panduan Mengenai Siasatan Kematian (Peruntukan yang Berkaitan dalam Bahagian VII Bab XXXII s 328–341 Kanun Tatacara Jenayah)'. They outline the protocol for examining witnesses, qualifications for witness examination, document disclosure, relaxation of formal procedures and rules of evidence, self-incrimination of witnesses, findings by the coroner/magistrate, and the verdict.

[15] The guideline for the death inquiry proceedings focuses on four essential aspects: identifying the deceased, investigating the specifics of the death (how, when, and where it occurred), gathering necessary information for legal death registration in accordance with the Births and Deaths Registration Act 1957 (Act 299), and identifying any individuals whose unlawful actions or omissions may have contributed to the death. This proceeding, however, does not extend to determining the criminal liability of these individuals. The

primary aim is to establish a comprehensive and factual understanding of the occurrence of the death, ensuring a thorough examination of the evidence, while maintaining a clear distinction between fact-finding and adjudication of guilt or innocence.

[16] The coroner's duty and/or function in making a finding and delivering the verdict is set out in the guideline as follows:

SIASATAN KEMATIAN

G Dapatan Koroner/Majistret

Koroner/Majistret yang mengendalikan Siasatan

Kematian hendaklah membuat dapatan mengenai —

(a) siapa si mati;

(b) bagaimana si mati mati;

(c) bila si mati mati;

(d) di mana si mati mati;

(e) sebab kematian si mati; dan

(f) mana-mana orang, yang melakukan perbuatan atau melakukan peninggalan yang menyalahi undang-undang yang menyebabkan kematian, tanpa membuat apa-apa dapatan mengenai liabiliti jenayah orang itu.

H. Keputusan (Verdict) Koroner/Majistret

Keputusan (verdict) Siasatan Kematian oleh Koroner/Majistret tidak boleh menentukan persoalan mengenai —

(a) liabiliti jenayah; atau

(b) liabiliti Sivil,

bagi seorang yang dinamakan.

Pada akhir Siasatan Kematian, Koroner/Majistret mesti menyampaikan verdict berdasarkan mana-mana satu yang berikut:

(a) mati yang tidak dapat ditentukan cara kematian (open verdict);

(b) mati akibat kemalangan (misadventure);

(c) mati akibat penyakit (natural deathj);

(d) mati akibatperbuatan orang lain (homicide);

(e) mati akibat perbuatan diri sendiri (suicide).

[17] Basically, guideline G and H above provides for the coroner in a death investigation, to meticulously uncover the facts surrounding the death,

A including its circumstances, causes, and any potential involvement of others in unlawful actions. However, their role does not encompass making determinations of criminal or civil liability for any party involved. This is to ensure a fair and impartial approach of only transcending into uncovering the truth surrounding the deceased's death and not to descend into the arena of B determining the liability of parties involved in either civil or criminal proceedings. In doing so, the coroner is exceeding its jurisdiction and usurping the function of the court. Therefore, for all purposes or intent the coroner must not dwell into the question of 'Why?' in the determination of the cause of death, for fear that the evidence proffered for the question 'Why?', has the C tendency to be descriptive of a defence to a civil or criminal liability, which is an issue for a different forum to determine.

[18] At the conclusion of a death investigation, the coroner/magistrate is D tasked with delivering a verdict that falls into one of several distinct categories, each providing insight into the circumstances surrounding the individual's demise. These verdicts serve to clarify the nature of the death investigation's findings. Firstly, there is the 'open verdict,' which is issued when the cause of death cannot be definitively determined. This verdict reflects uncertainty regarding the manner of death. Secondly, the 'misadventure' verdict is E employed when the death is attributed to an unfortunate accident, highlighting that the individual's demise was the result of a mishap rather than intentional actions. On the other hand, the 'natural death' verdict is assigned when the death is attributed solely to natural causes, such as illness or disease. In contrast, the 'homicide' verdict is declared when the investigation reveals F that the individual's death was the result of the actions of another person, indicating potential criminal involvement. Finally, the 'suicide' verdict is employed when the evidence points to the individual intentionally causing their own death. These verdicts provide essential clarity regarding the circumstances and causes of death, facilitating further legal proceedings or G actions as necessary.

[19] In our present case, the coroner issued an 'open verdict' after inquiring into the case. It is elaborated upon in the case of *Teoh Meng Kee v Public Prosecutor* [2014] 5 MLJ 741; [2014] 7 CLJ 1034, that an open verdict is H considered valid when there is inadequate evidence to completely ascertain the cause of death. It reflects situations where intentions or circumstances are unclear, such as whether it was a suicide or an accident or when suspicions of foul play lack conclusive proof. It is said in these words:

I The 'Open Verdict'

> [49] To return an 'open verdict' is not a sign of failure; it is a verdict in its own right. We have been referred to a very useful text by Christopher Dorries; coroners' courts — *A Guide to Law and Practice* (2nd Ed), which deserves quotation for its concise statement of the principles:

> An open verdict is a decision by the coroner or jury that the evidence 'does not fully or further disclose the means whereby the cause of death arose'. It is a verdict in its own right, indicating that the evidence is insufficient to satisfy any other conclusions. This may arise because, despite the best efforts of an investigation, it is impossible to determine whether a death was intended a suicide or came about by accident. In other cases there may be a suspicion that foul play is involved but no proof to the required level (at p 272 of the text).

[20] In other words, when the coroner encounters a situation where it is impossible to ascertain whether the cause of death can be classified as 'misadventure,' 'natural cause,' 'homicide,' or 'suicide,' the only suitable verdict that the coroner should take is to issue an 'open verdict'.

[21] The Criminal Procedure Code ('the CPC') of Malaysia, specifically ss 328, 337 and 339, does not clearly specify the standard of proof required in an inquest proceeding. In practice however, the standard of proof typically adopted is on a balance of probabilities, a common benchmark in civil proceedings. This implies that for evidence to be accepted, it must more likely be true than not. However, in instances involving allegations of suicide or homicide, there is some concern over whether a higher threshold, akin to 'beyond reasonable doubt' used in criminal cases, should apply, given the seriousness of these allegations. This concern is addressed by reference to the *Briginshaw* principle, derived from the Australian case *Briginshaw v Briginshaw* (1938) 60 CLR 336. This principle introduces a 'sliding scale' approach within the framework of the balance of probabilities standard in civil cases. It dictates that for more serious or inherently unlikely allegations, the evidence must be clearer, more cogent, and persuasive. Thus, while the balance of probabilities is the foundational standard, the level of certainty needed escalates with the gravity of the allegations. This ensures that the more serious the accusation, the stronger the evidence required to substantiate it, reflecting the potential consequences of the findings.

[22] To summarise, the standard of proof in these cases primarily remains on the balance of probabilities. However, this standard escalates on a sliding scale depending on the seriousness of the allegation.

EVALUATING THE SUBMISSION OF THE PARTIES

[23] The respondent submits that the coroner's decision to issue an 'open verdict' is justified based on the following grounds:

(a) though the evidence confirms the deceased was killed by gunshots from police officers SI3 and SI4, the main issue is determining whether these shots were lawfully discharged in self-defence. The complexity in making

this assessment supports the coroner's decision for an open verdict, as it remains uncertain whether the police action was justifiable or excessive;

(b) the testimony of SI3 and SI4 provide crucial insights into their roles and the circumstances of their encounter with the deceased's vehicle. This vehicle was behaving suspiciously and moving slowly past closed shops during the early hours, the reasons for which are unclear. This aspect is vital in understanding the chain of events leading to the shooting, thus according to the respondent, warrants an open verdict;

(c) according to the police narrative, a pursuit ensued after the deceased did not comply with instructions to stop, leading to a violation of traffic signals and high speed chase. The crucial point was when the deceased reportedly got out of the car with a pistol and shot at the police. This sequence according to the respondent, justify the police's response but also introduces ambiguity, reinforcing the need for an open verdict;

(d) the postmortem report reveals three gunshot wounds. The lack of gun shot residue ('GSR') on the deceased and on the gun found nearby, along with the fact that the firearms were unregistered yet operational, are significant. This contrasts with the police officers' SI3 and SI4 testimonies of returning fire after hearing a gunshot. These factors suggest possible self-defence by SI3 and SI4, but the absence of GSR casts doubt on the shooting's dynamics, thereby supporting the open verdict;

(e) the coroner having thoroughly examined all the evidence, including witness statements, the crime scene, and various reports. The missing bullet casings, absence of GSR on the deceased's hands, absence of fingerprints on the gun and lack of a ballistic report leave gaps in the chain of evidence. These gaps according to the respondent justify the coroner's decision for an open verdict; and

(f) the respondent points out that while there is evidence suggesting the police faced a threatening situation, the absence of certain crucial evidence, such as clear ballistic links, impedes a conclusive judgment about the police's use of deadly force. These unresolved issues in the incident support the open verdict.

[24] For the reasons outlined above, the respondent submits that the open verdict is suitable given the case's complexities and uncertainties.

THE CORONER'S FINDING

[25] The coroner's role according to the Practice Direction No 2 of 2019, is strictly to adhere to them and make determinations within the scope of their jurisdiction, as defined under s 337 of the Criminal Procedure Code ('the CPC'). This guideline ensures that the coroner's functions are performed in

line with the provisions of the law and do not overstep the boundaries set therein.

[26] Section 337 of the CPC provides:

> 337 Inquiries to be made by Magistrate
>
> A Magistrate holding an inquiry shall inquire when, where, how and after what manner the deceased came by his death and also whether any person is criminally concerned in the cause of the death.

[27] The learned coroner in inquiring into cause of death of the deceased under s 337 of the CPC, has made the determination on the following questions:

(a) who the deceased was? Mohan a/l Gopela Krishnan;

(b) how the deceased died? Here the learned coroner did not make a straight forward determination. Instead the coroner went at some length into the facts of the case. In a gist she said the death of the deceased occurred during a police operation. The police encountered a suspicious Proton Waja car and attempted to stop it. However, the car, driven by the deceased, sped off, leading to a chase. After the Proton Waja veered-off, the deceased exited the car and was shot by the police in self-defence, resulting in his death. I would not be wrong to surmise the coroner's determination on this question is 'the deceased was shot with a gun';

(c) when the deceased died? He died on '8.10.2016 at 3.40am';

(d) where the deceased died? He died along 'Jalan Besar Simpang Lima, Pekan Gurney, Manjung, Perak';

(e) what is the cause of the deceased's death? The cause of death is because of excessive bleeding due to gunshot wounds in the chest ('pendarahan berlebihan akibat luka-luka tembak di dada'); and

(f) is there any person who committed an act or omission that is against the law which caused the death (without making any findings regarding the criminal liability of that person)? 'Yes, SI3 (ASP Sukjit Singh Jagara Singh) and SI4 (Detektif Sarjan Zulhadi bin Ramli) who were involved in the shooting with the deceased, in performance of police duties'.

[28] In making the determination under s 337 of the CPC, the learned coroner proceeded to make an 'open verdict' in stating as follows:

> Verdict
>
> – Therefore the verdict in this case inquest is — OPEN;
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> – There was no bullet nor casing found at the scene;

– There was no gun shot residue on the deceased person's hand, as per the testimony of witnesses that testified the deceased fired a single shot at the police;

– There was no finger print lifted off the gun purportedly used by the deceased; and

– There was no ballistic report tendered to court.

REVISIONARY EXERCISE OF POWER

[29] Before I embark on the revision exercise, it is essential to acknowledge that, as stated in s 31 of the Courts of Judicature Act 1964 and s 323 of the Criminal Procedure Code ('the CPC'), the powers of revision are strictly defined and limited by statute. Therefore, a review is only permissible within the constraints of these legal provisions. Consequently, it is imperative before considering a review of the magistrate's inquiry findings, to first determine if the magistrate's inquiry findings qualify for revision under these statutes prior to establishing whether such findings are even eligible for revision and then to ascertain the accuracy, legality, and appropriateness of the coroner's conclusions and to correct any miscarriage of justice. His Lordship Suriyadi J (as he them was) clearly articulated this principle in *Public Prosecutor v Shanmugam & Ors* [2002] 6 MLJ 562:

> It is trite law that the powers of revision (interchangeably, powers of review) are creatures of statute. Unless permitted by the scope of the promulgated provisions, the invocation of the powers will not be allowed. On that understanding, before proceeding with the review, if any, I had to overcome that first jurisdictional obstacle, ie whether the magistrate's inquiry finding could be subject to revision. Even if I were to invoke my powers of revision, it was principally to satisfy myself as to the correctness, legality or propriety of the finding arrived at by him (s 31 of the Courts of Judicature Act 1964 and s 323 of the CPC). Returning to the statutory mandate of the magistrate, if I were to invoke my powers, the follow up relevant question left for my consideration, which required some intense scrutiny, was to find out the causes of the six deaths, and decide, inter alia, whether they:
>
> (a) could be categorised as misadventure, and person or persons known or unknown, were or were not criminally involved;
>
> (b) were caused by natural causes;
>
> (c) were acts of God; or
>
> (d) an open verdict should be pronounced.
>
> The bottom line in my exercise of the revisionary powers, if any, is to disturb the conclusions or findings of the magistrate, in order to do justice or correct any miscarriage of justice (see *Public Prosecutor v Kulasingam* [1974] 2 MLJ 26 and *Hari Ram Seghal v Public Prosecutor* [1981] 1 MLJ 165). Wan Yahya J (as His Lordship then was) had occasion to opine in the latter case [2002] 6 MLJ 562 at 570 at pp 166–168, when discussing provisions of revision that fell under Part VII that:
>
> The object of these provisions is to correct any miscarriage of justice arising not

> only from error in judgment and procedure but from neglect or indolence on the part of those in authority and resulting in undeserved hardship on any individual affected by such judgment, neglect or indolence ... Any mistake or flaw in that machinery, which may have the possibility of injustice, must be resolved in their favor.

[30] Neither the applicant nor the respondent raised any jurisdictional concerns regarding my authority to revise the coroner's findings. In any event, the task of revision this time around was by the Court of Appeal as mentioned earlier. As such, I will not dwell on this aspect, except to affirm that I possess the requisite power to revise these findings as per s 35(1) of the Courts of Judicature Act 1964 and s 325(1) of the Criminal Procedure Code.

[31] The next crucial step in my review process is to examine the coroner's determination regarding the cause of the deceased's death. Particularly, I will scrutinise the coroner's decision to classify the cause of death, which led to the issuance of an 'open verdict' due to the coroner's inability to reach a more definitive conclusion.

[32] A coroner conducting an inquiry must strictly adhere to the evidence and reach a verdict based on established facts as per s 337 of the CPC. Speculation and probabilities are not acceptable bases for a verdict.

[33] The court in *Inquest into the Death of Anthony Chang Kim Fook* [2007] MLJU 1; [2007] 2 CLJ 362, observed: s 337 of the CPC delineates the framework for the coroner's inquest into a death. Consequently, the coroner is required to adhere strictly to this framework and is not permitted to operate beyond the boundaries established by these terms of reference. His Lordship Sulong Mattjeraie J said:

> *Section 337 of the CPC* serves as the terms of reference within which the coroner conducts the inquest into the death of the deceased. As such the coroner cannot act outside the perimeter of the said terms of reference.

[34] If the evidence doesn't meet the required standard, on a balance of probabilities for a verdict of misadventure, natural causes, suicide or homicide, an open verdict is the last option. A coroner should not return with an 'open verdict' if uncertainties are minor but there are evidence clearly indicating how the death occurred.

EVALUATING THE FINDINGS OF THE CORONER

[35] As para 27 outlines, the coroner had clearly identified who the deceased was, the time and place of his death, the cause of death, and any involvement of others. With these primary question in s 337 of the CPC being answered, the

coroner should have reached a conclusive verdict. An 'open verdict' is not even the least fitting verdict. Considering the coroner was inclined to the police version of the incident a 'misadventure' verdict would be the usual verdict.

[36] The coroner was excessively concerned of certain evidence that were not presented at the inquest, which she believed created a gap in the evidence chain. This concern according to her led her to issue an 'open verdict'.

[37] I will now analyse the coroner's findings that led to her issuing the 'open verdict'.

[38] The coroner found that the police, during their duty, observed the deceased acting suspiciously in a slowly driven car. When signalled to pull over, he fled and did not stop until his car allegedly veered off the road. When he exited from the car the police allegedly identified themselves by shouting the word 'police', and at that instant the deceased reportedly fired a shot at the police, which led to them retaliate by shooting, hitting the deceased twice in the chest and once in the leg, killing him instantly.

[39] There is no evidence suggesting that the deceased knowingly fled from the police, as the police car used in the chase was without police insignia. It is unclear if the deceased knew he was fleeing from the police.

[40] The coroner seemed to accept that the deceased's car veered off the road during the chase, but the photo of the stalled car shows it was parked and with the handbrake engaged. This indicates the deceased intentionally parked before exiting. The coroner overlooked this. This evidence is crucial because the police shot the deceased after he exited the car. During the initial pursuit on the road, the deceased may not have realised the police were chasing him but might have realised later because of the police siren, leading him to pull over, park, and exit. It is unknown whether he intended to surrender to the police. Even if the parking and handbrake engagement were coincidental and the deceased did fire at the police upon exiting, as claimed by the police, leading to their return of fire in self-defence, this part of the police narrative remains questionable.

[41] I believe that when tested against the evidence, the police's version of the event lacks logic and coherence.

[42] The forensic findings prove the gun found next to the deceased did not have the deceased DNA or finger print on it. There is no 'gunshot residue' ('GSR') on the said gun or on the deceased. Further, there were no bullet casing found near the deceased and there is no bullet trajectory which refers to the path that a bullet from the moment it was allegedly fired by the deceased until

it reached its target. If the deceased had fired the gun there should have been a positive finding of the evidence of the deceased's DNA, finger print, GSR and bullet trajectory. In the absence of this evidence, the only conclusion that one can come to is, the deceased did not fire a gun during the incident.

[43] That is not all there is to it, the conduct of officers SI3 and SI4, clearly shows their failure to adhere to the Inspector General Standing Order ('IGSO') guidelines during the discharge of their duties. These officers admitted to shooting at the chest/body of the deceased, an action that demonstrates a blatant disregard and ignorance of the IGSO, which stipulates more restrained and specific methods of engagement, such as shooting at the legs or tires. This ignorance and deviation from established protocols were deemed unreasonable.

[44] Here the coroner, instead of concluding that the deceased did not fire the gun on the fateful day, appears not to have fully grasped the details and implications of the evidence related to the case. This indicates a lack of judicial appreciation of the evidence presented before her.

[45] The significance of the IGSO was established in two cases. In *Noor Shariful Rizal bin Noor Zawawi v Public Prosecutor* [2017] 3 MLJ 460, the IGSO was confirmed to have legal effect. Subsequently, the case of *Ketua Polis Daerah Shah Alam & Ors v Nor Azura bt Amzah (administrator for the estate of Aminulrashid bin Amzah, deceased) & Anor and another appeal* [2018] 5 MLJ 805, further affirms the legal accountability of police actions based on the IGSO guidelines, where the court ruled that the police were guilty of wrongful shooting due to the absence of evidence indicating that the deceased posed a threat.

[46] In the present case, forensic evidence confirms that the deceased did not fire the gun, and the weapons found in the car did not pose a threat to the officers, who stood 20 metres away. Moreover, there was no threat, imminent or otherwise, involving the deceased on the day of the incident, officers SI3 and SI4 were only suspicious of the deceased because he drove very slowly around the closed shops in the early hours.

[47] This situation differs from the case of *Public Prosecutor v Shanmugam & Ors*, where a crime was actively in progress and the police were on an operation, targeted to apprehend the deceased. In that case, the verdict was misadventure because the police were on an operation to apprehend the deceased whereby they anticipated some form of altercation in the process but when the inquest found that the deceased was unarmed and the police had mistakenly opened fire killing all occupants in the vehicle thinking shots had been fired from the vehicle, the verdict was 'misadventure'.

[48] In the present case, the police were not engaged in an operation specifically aimed at apprehending the deceased, nor were they in pursuit of an ongoing crime. Officers SI3 and SI4 merely noticed a car being driven suspiciously (slowly). Given that the only cause for suspicion was the slow driving, it should have been clear to the officers that there was no need for the use of a firearm. Under these circumstances, shooting at the legs was also unnecessary. Even if there was a need to use a firearm, then the officers were obligated to aim only at the legs of the deceased. Instead, the evidence recorded from SI4 during the inquest was an unequivocal statement that they 'aimed to kill' the deceased. This was the evidence proffered by SI4:

> Mahkamah: Soalan peguam, adakah awak tembak untuk membunuh, untuk 'aim to kill' itu dalam Bahasa Inggeris, setuju atau tak setuju?
>
> SI4 : Setuju Yang Arif.
>
> Encik Raam: Tiada soalan lain Yang Arif. Terima Kasih.

[49] Between the verdicts of misadventure and homicide in cases involving death by gunshot, where the firing of the shot was with the 'aim to kill,' and the factual scenario was such that no crime was in pursuit or progress, no evidence of alleged use of a firearm existed, and no threat of any kind was posed to the police who shot the deceased in the chest twice, resulting in death. On the preponderance of evidence before the inquest proceeding and all questions for determining the cause of death under s 337 of the CPC being answered and even on sliding scale standard of proof under *Briginshaw* principle the learned coroner ought to have arrived at a definitive verdict of 'homicide' rather than an 'open verdict'.

[50] In expressing concern over the conduct of the inquest in the present case, the learned coroner appears to have exceeded the terms of reference under s 337 of the CPC. Her decision seems to lean toward justifying the police's actions, which should not be the case. A similar concern was addressed in *Public Prosecutor v Shanmugam & Ors*. I can do no better than to refer to a passage from that decision, as articulated by His Lordship Suriyadi J (as he then was):

> To reiterate, when conducting an inquiry a magistrate must confine himself to the evidence and arrive at a specific verdict based only on the established facts pursuant to s 337 of the CPC. Probabilities and guesswork can never be the basis for that specific verdict. *If the evidence does not reach the required standard, to enable the learned magistrate to reach a verdict of misadventure, or death caused by natural causes or act of God, then an open verdict would be the last resort. The latter verdict must not be adverted to if the uncertainties are very minor, but the availability of evidence is there to show how the deceased person came by his death*. It was indisputable that no evidence was adduced as to whose bullets actually caused those deaths, eg PW1 testified that he never even discharged his 7.65 Walter whilst PW7 merely

discharged once, and even that towards the direction of the van. Yet six persons died. Here the cause of death was the gunshots, and on that aspect there was no uncertainty. What was uncertain was the exact identity of the culprit or culprits, and whether there was any criminality involved in the shootout.

...

Expanding from there, I was quite stunned by the format of the magistrate's decision as it bordered on the preparation of the defense of the police over zealousness. In fact it was not a decision that could be construed as a verdict but a ground of decision, based on a non-verdict. At worst he could have merely recorded that the deaths were caused by misadventure, as a result of multiple shot wounds on the heads and bodies, but unfortunately had failed to do so. It must be borne in mind that if there were to be uncertainty on certain parts of the inquiry, like when or where he died etc, but with there being sufficient evidence to record how he died, a verdict of misadventure must be handed down. If in the case of *Re Davies (deceased)* [1967] 1 All ER 688 death caused by sleep walking hence an accident, could justify a verdict of misadventure, surely in this case it was more than qualified to be categorised as such. Even the very basis of the finding, that no criminal act had been committed seemed to be founded on shaky grounds, as that conclusion went against the grain of the evidence. As dissected earlier, there was no cogent proof to confirm of any shots having been fired from the van vis a vis the accurate shots of the police. At the end of the day even though there were many ifs and questions badgering me, but as there was sufficient evidence to conclude as to how the deceased persons met their deaths I had no hesitation in quashing the verdict of the learned magistrate, and substituting it with a verdict of misadventure with the deceased persons being shot by person or persons unknown. Due to the insufficiency of evidence before the court to convict any person or persons in the shootout, the conclusion of 'being shot by person or persons unknown' (as insufficient evidence were made available to court to decide whose bullets killed them), must be alluded to. These two ingredients in the verdict are included as under s 328 of the CPC, 'cause of death' includes not only the apparent cause of death ascertainable by inspection or post mortem examination of the body of the deceased, but also all matters necessary to enable an opinion to be formed as to the manner in which the deceased came by his death, and as to whether his death resulted in any way, or was accelerated by, any act or omission of any other person. Regretfully, I was unable to conclude whether there was any outright criminality committed by any identifiable police personnel, as there was also insufficient evidence before me for consideration.

In conclusion, I must reiterate that after invoking my revisionary powers and after reviewing the evidence, the decision of the learned magistrate was set aside and substituted with a verdict of misadventure, with the deceased persons being shot by person or persons unknown.

CONCLUSION

[51] Considering all the evidence before the inquest and the learned coroner's limited judicial appreciation of them, I am empowered by s 323 of the

A CPC and s 35 of the Courts of Judicature Act 1964 to set aside the 'open verdict' of the learned coroner and substitute with 'homicide'. This substitution is due to the deceased being shot by a known person(s) in a situation where shooting was unwarranted and the act of shooting and the resultant death stemmed from an intention to 'aim to kill' by the known
B person(s).

Order accordingly.

Reported by Nabilah Syahida Abdullah Salleh

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